Supreme Court, U. S.
FILED
FEB 28 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court

of the United States

OCTOBER TERM, 1976

No. 76-1039

WARREN B. WILSON,

Appellant,

v.

O. MEREDITH WILSON, JR., FRANK H. HILTON, JR., HUGH SMITH, GREGORY T. HORNECKER, RONALD L. MARCEAU, EDWARD H. WARREN, THOMAS B. BRAND, JAMES W. KORTH and JON B. LUND, constituting the Board of Examiners of the Oregon State Bar, individually and in their official capacities; HOWARD A. RANKIN, DOUGLAS E. KAUFMAN, JOHN H. HOLLOWAY, WILLARD K. CAREY, DAVID S. PATTULLO, RAYMOND J. SALISBURY, ORLANDO J. HOLLIS, EDWIN J. PETERSON, DONALD R. WILSON, MERLE A. LONG, JAMES O. GARRETT, CARL R. NEIL, KENNETH E. ROBERTS, SR., and PETER L. BARNHISEL, constituting the Board of Governors of the Oregon State Bar, individually and in their official capacities; and KENNETH J. O'CONNELL, WILLIAM M. McALLISTER, ARNO H. DENECKE, RALPH M. HOLMAN, THOMAS H. TONGUE, E. H. HOWELL and DEAN BRYSON, the Honorable Justices of the Supreme Court of the State of Oregon, individually and in their official capacities,

Appellees.

On Appeal from the United States District Court for the District of Oregon

MOTION TO AFFIRM

R. W. NAHSTOLL
1331 S. W. Broadway
Portland, Oregon 97201
Attorney for Appellees

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 2-77

INDEX

	Page
Motion to Affirm	1
Statement	2
Argument	2

TABLE OF AUTHORITIES

Cases

Brown v. *Supreme Court of Virginia*, 359 F. Supp. 549 (E.D. Va. 1973) aff'd. 414 U.S. 1034 (1973)	2, 3, 4, 5
Dent v. *West Virginia*, 129 U.S. 114 (1889)	6
Detroit Police Officers Assn. v. *City of Detroit*, 405 U.S. 950 (1972)	3
Dunn v. *Blumstein*, 405 U.S. 330 (1972)	4
Graves v. *Minnesota*, 272 U.S. 425 (1926)	6
Great A&P Tea Co., Inc. v. *Cottrell*, 424 U.S. 366, 96 S. Ct. 923, 47 L. Ed. 2d 55 (1976)	5
Hicks v. *Miranda*, 422 U.S. 332 (1975)	3
Hitchcock v. *Collenberg*, 353 U.S. 919 (1957)	6
Kovrak v. *Ginsburg*, 358 U.S. 52 (1958)	6
Martin v. *Davis*, 357 P.2d 782 (1960)	6
Martin v. *Walton*, 368 U.S. 25, 82 S. Ct. 1, 7 L. Ed. 2d 5 (1961)	5, 6
McCarthy v. *Philadelphia Civil Service Commission*, 424 U.S. 645, 96 S. Ct. 1154, 47 L. Ed. 2d 366 (1976)	3, 4, 5
Memorial Hospital v. *Maricopa County*, 415 U.S. 250 (1974)	4

TABLE OF AUTHORITIES (Cont.)

	Page
Phelps v. *Board of Education*, 300 U.S. 319 (1937)	6
Pike v. *Bruce Church, Inc.*, 397 U.S. 137, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970)	5
Schware v. *Board of Bar Examiners*, 353 U.S. 232 (1957)	6
Shapiro v. *Thompson*, 394 U.S. 618 (1969)	3, 4
Suffling v. *Bondurant*, 339 F. Supp. 257 (D. N.M. 1972), aff'd 409 U.S. 1020 (1972)	3, 4
Toomer v. *Witsell*, 334 U.S. 385, 68 S. Ct. 1156, 92 L. Ed. 1460 (1948)	5
Wardwell v. *Board of Education of Cincinnati*, 529 F.2d 625 (C.A. 6 1976)	3

Statutes

Kan. Gen. Stat. 1949, § 7-104	6
Kan. Sup. Ct. Rules 41 and 54	6

Oregon Supreme Court Rules

Admission of Attorneys 7.05	6

In the Supreme Court
of the United States

OCTOBER TERM, 1976

No. 76-1039

WARREN B. WILSON, *Appellant,*

v.

O. MEREDITH WILSON, JR., FRANK H. HILTON, JR., HUGH SMITH, GREGORY T. HORNECKER, RONALD L. MARCEAU, EDWARD H. WARREN, THOMAS B. BRAND, JAMES W. KORTH and JON B. LUND, constituting the Board of Examiners of the Oregon State Bar, individually and in their official capacities; HOWARD A. RANKIN, DOUGLAS E. KAUFMAN, JOHN H. HOLLOWAY, WILLARD K. CAREY, DAVID S. PATTULLO, RAYMOND J. SALISBURY, ORLANDO J. HOLLIS, EDWIN J. PETERSON, DONALD R. WILSON, MERLE A. LONG, JAMES O. GARRETT, CARL R. NEIL, KENNETH E. ROBERTS, SR., and PETER L. BARNHISEL, constituting the Board of Governors of the Oregon State Bar, individually and in their official capacities; and KENNETH J. O'CONNELL, WILLIAM M. McALLISTER, ARNO H. DENECKE, RALPH M. HOLMAN, THOMAS H. TONGUE, E. H. HOWELL and DEAN BRYSON, the Honorable Justices of the Supreme Court of the State of Oregon, individually and in their official capacities, *Appellees.*

On Appeal from the United States District Court for the District of Oregon

MOTION TO AFFIRM

Appellees, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, move that the

final judgment and decree of the District Court be affirmed on the ground that the question is so unsubstantial as not to warrant further argument.

STATEMENT

The Oregon statutes and the rules of the Oregon Supreme Court require that an applicant for admission to the Bar be a resident of Oregon at the time of admission. The official application form for admission to the Oregon State Bar requires that an applicant state at the time of application his intention to become a resident at the time of admission.

Appellant is a resident of California who has no intention of becoming a resident of Oregon and has so indicated on his application for admission to the Oregon State Bar. In this action, the appellant challenged Oregon's residency requirement on various constitutional grounds.

The District Court rejected appellant's various constitutional challenges and held that Oregon's residency requirement is lawful.

ARGUMENT

The decision of the District Court is clearly correct. This Court has rejected the contention that bar residency requirements are violative of the Equal Protection Clause of the Fourteenth Amendment or the constitutional right of interstate travel. *Brown* v. *Supreme Court of Virginia*, 359 F. Supp. 549 (E.D. Va. 1973), aff'd 414 U.S. 1034 (1973). Indeed this Court has upheld the constitutionality of a six month durational residency requirement against a challenge that it violated equal protection and the right to travel. *Suffling* v. *Bondurant*, 339 F. Supp. 257 (D. N.M. 1972), aff'd 409 U.S. 1020 (1972). *A fortiori*, Oregon's less drastic contemporaneous residency requirement is constitutionally permissible.

Any doubt concerning the constitutionality of contemporaneous residency requirements like that at issue here was put to rest by the Court's decision last term in *McCarthy* v. *Philadelphia Civil Service Commission*, 424 U.S. 645, 96 S. Ct. 1154, 47 L. Ed. 2d 366 (1976), which held in pertinent part:

> "The Michigan Supreme Court held that Detroit's [residency] requirement for police officers was not irrational and did not violate the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment. We dismissed the appeal from that judgment because no substantial federal question was presented. *Detroit Police Officers Assn.* v. *City of Detroit*, 405 U.S. 950 (1972). We have therefore held that this kind of ordinance is not irrational. *Hicks* v. *Miranda*, 422 U.S. 332, 343-345 (1975); see *Wardwell* v. *Board of Education of Cincinnati*, 529 F.2d 625, 629 (C.A. 6 1976).
>
> "We have not, however, specifically addressed the contention made by appellant in this case that his constitutionally recognized right to travel interstate as defined in *Shapiro* v. *Thompson*, 394 U.S.

618 (1969); *Dunn* v. *Blumstein*, 405 U.S. 330 (1972); and *Memorial Hospital* v. *Maricopa County*, 415 US 250 (1974), is impaired. Each of those cases involved a statutory requirement of residence in the State for at least one year before becoming eligible either to vote, as in *Dunn*, or to receive welfare benefits, as in *Shapiro* and *Memorial Hospital*. Neither in those cases, nor in any others, have we questioned the validity of a condition placed upon municipal employment that a person be a resident *at the time* of his application. In this case appellant claims a constitutional right to be employed by the city of Philadelphia *while* he is living elsewhere. There is no support in our cases for such claim.

"We have previously differentiated between a requirement of continuing residency and a requirement of prior residency of a given duration. Thus in *Shapiro, supra*, at 636, we stated: 'The residence requirement and the one-year waiting-period requirement are distinct and independent prerequisites.' And in *Memorial Hospital, supra*, at 255, quoting *Dunn, supra*, at 342 n. 13, the Court explained that *Shapiro* and *Dunn* did not question ' "the validity of appropriately defined and uniformly applied bona fide residence requirements." '

"This case involves that kind of bona fide continuing residence requirement. The judgment of the Commonwealth Court of Pennsylvania is therefore affirmed." 424 U.S. at 645-647, 96 S. Ct. at 1154-1155, 47 L. Ed. 2d at 368-369 (footnotes omitted).

Brown, *Suffling* and *McCarthy* foreclose any possible argument that the Oregon State Bar's residency requirement for admission is unconstitutional.[1]

The appellant also contends that the Oregon Supreme Court's dual practice rule is unconstitutional. If Oregon's residency requirement is proper then ap-

---

[1] The appellant argues that the issues raised by this case are novel because prior decisions concerning bona fide residency requirements did not deal with challenges premised expressly on the Privileges and Immunities Clause, the Interstate Commerce Clause and the irrebuttable presumption doctrine.

This argument is meritless. With respect to the Privileges and Immunities Clause, this Court has previously held that:

> "[The Clause] does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it. Thus, the inquiry in each case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them. The inquiry must also, of course, be conducted with due regard for the principle that the States should have considerable leeway in analyzing local evils and in prescribing appropriate cures."

Toomer v. *Witsell*, 334 U.S. 385, 396, 68 S. Ct. 1156, 1162, 92 L. Ed. 1460, 1471 (1948) (footnote omitted). Cases such as *Brown* v. *Supreme Court of Virginia, supra*, and *Martin* v. *Walton*, 368 U.S. 25, 82 S. Ct. 1, 7 L. Ed. 2d 5 (1961), establish that there is a close and constitutionally permissible relationship between residency requirements and the states' interest in regulating the practice of law within their boundaries. The principles announced in these cases, although declared in the context of an equal protection analysis, apply equally to appellant's contention that Oregon's residency rules violate the Privileges and Immunities Clause.

The same reasoning disposes of appellant's Interstate Commerce Clause challenge. *See generally Great A&P Tea Co., Inc.* v. *Cottrell*, 424 U.S. 366, 96 S. Ct. 923, 47 L. Ed. 2d 55 (1976); *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970).

Finally, appellant's reliance on the irrebuttable presumption doctrine is misplaced. As appellant concedes, that doctrine is founded on the constitutional guarantee of due process. This Court has specifically rejected arguments that bona fide residency requirements are violative of due process. See *McCarthy* v. *Philadelphia Civil Service Commission*, 424 U.S. 645, 96 S. Ct. 1154, 47 L. Ed. 2d 366 (1976).

pellant, a non-resident, has no standing to raise this argument. But in any event the argument is without merit. Appellant's contention is foreclosed by a prior decision of this Court, *Martin* v. *Walton*, 368 U.S. 25, 82 S. Ct. 1, 7 L. Ed. 2d 5 (1961), which held:

> "The appeal is dismissed for want of a substantial federal question. Upon plenary consideration, we are satisfied that, both on their face and as applied to appellant, Kan. Gen. Stat., 1949, § 7-104, and amended Kan. Sup. Ct. Rules 41 and 54 promulgated by the Supreme Court of Kansas, acting within its competence under state law, are not beyond the allowable range of state action under the Fourteenth Amendment. See, *e.g.*, *Dent* v. *West Virginia*, 129 US 114; *Graves* v. *Minnesota*, 272 US 425; *Schware* v. *Board of Bar Examiners*, 353 US 232, 239; *Hitchcock* v. *Collenberg*, 353 US 919; *Kovrak* v. *Ginsburg*, 358 US 52. We cannot disregard the reasons given by the Kansas Supreme Court for the Rules in question. 187 Kan 473, 357 P2d 782. Nor does the fact that the Rules may result in 'incidental individual inequality' make them offensive to the Fourteenth Amendment. *Phelps* v. *Board of Education*, 300 US 319, 324." 368 U.S. at 25-26, 82 S. Ct. at 2, 7 L. Ed. 2d at 6.

The Kansas Supreme Court Rules at issue in *Martin* v. *Walton*, *supra*, were equivalent in all relevant respects to the Oregon Supreme Court's dual practice rule. *Compare Martin* v. *Davis*, 357 P.2d at 784-785 *with* Oregon Supreme Court Rule for Admission of Attorneys 7.05, reprinted on page 3 of Appellant's Jurisdictional Statement.

We respectfully submit, therefore, that the appellant presents no substantial question for the decision of this Court, and that the judgment and decree of the District Court should be affirmed.

Respectfully submitted,

R. W. NAHSTOLL
1331 S. W. Broadway
Portland, Oregon 97201
Attorney for Appellees